

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
Amendment to the Commission's Rules) WT-Docket No. 96-6
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Services)

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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November 12, 1997

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THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ submits its Comments in the above-captioned proceeding. CTIA supports the Petition for Partial Reconsideration or Clarification filed by BellSouth Corporation ("BellSouth") in this docket.²

I. INTRODUCTION AND SUMMARY

BellSouth requests that the Commission delete Section 22.323 of its Rules in accordance with the Commission's Report and Order permitting flexible service offerings by "CMRS" providers.³

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

² In re Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, BellSouth Petition for Partial Reconsideration or Clarification (filed September 30, 1996) ("Petition"). Public comment on the BellSouth Petition was invited on September 25, 1997 (DA 97-2083).

³ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services,

BellSouth argued that Section 22.323 is inconsistent with the Report and Order.

The Report and Order eliminated the restrictions under which all CMRS providers (broadband and narrowband) could provide fixed wireless services.⁴ CTIA wholeheartedly supported the Commission in this endeavor. As described by the Commission, its decision offers administrative simplicity and certainty, which, in turn, will encourage technical innovation and experimentation.⁵ Allowing flexible use of the CMRS spectrum will stimulate competition,⁶ encourage efficient use of the spectrum, and promote diversity in the types of combinations of services offered to the public.⁷

However, Section 22.323, implemented prior to the Report and Order, does not reflect the decisions reached or the policies developed in the Report and Order and still limits Part 22 licensees to providing fixed wireless services that are "incidental" to the mobile services cellular carriers provide.⁸ BellSouth requested that the Commission either (1) issue an

First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965 (1996) ("Report and Order").

4 The Commission amended its rules to allow providers of narrowband and broadband PCS, cellular, CMRS Specialized Mobile Radio (SMR), CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services "to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services." (emphasis added) Id. at ¶ 2.

5 Id. at ¶ 19.

6 Id. at ¶ 20.

7 Id. at ¶ 22.

8 47 C.F.R. § 22.323.

Erratum eliminating the rule; (2) reconsider its decision not to eliminate or modify the rule; or (3) issue a declaratory ruling stating that Section 22.323 is inapplicable to CMRS licensees providing services pursuant to the Report and Order. CTIA supports the Commission's conclusions in the Report and Order and therefore requests that the Commission grant BellSouth's Petition.

II. THE COMMISSION SHOULD ELIMINATE OR MODIFY SECTION 22.323 OF ITS RULES

Prior to the Report and Order, the Commission's Rules allowed CMRS licensees to provide mobile services on their assigned spectrum as well as some auxiliary services. The rules for cellular, PCS and SMR providers, among others, provided that such licensees could provide some forms of fixed services on their assigned spectrum on an "ancillary," "auxiliary," or "incidental" basis. Those rules were intended to provide some flexibility to CMRS licensees who chose to complement their mobile service offerings with fixed or other services.

The rules, however, were limited by the terms discussed above which had never been defined and had caused uncertainty among carriers which, in turn, were hesitant to take advantage of the flexibility offered without seeking further guidance from the Commission.⁹ Recognizing that its original reasons for limiting the services to be offered by mobile carriers¹⁰ had been

⁹ Report and Order at ¶ 8.

¹⁰ The Commission noted that "[t]he rationale for prohibiting non-ancillary fixed uses of the spectrum has been that the amount of spectrum available for the development of new

overtaken by the existence of a competitive CMRS market, the Commission decided to change its Rules to permit more flexible service offerings. In the Report and Order, the Commission concluded that "fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS."¹¹ It eliminated the terms "ancillary," "auxiliary," and "incidental" and modified its CMRS rules to allow CMRS spectrum to be used "on a co-primary basis for fixed services, mobile services, or any combination of the two."¹² CTIA supports this determination and believes that the Commission's Rules must reflect its conclusions.

CTIA enthusiastically endorsed the Commission's decision to liberalize the use of CMRS spectrum. The Report and Order reflects a recognition on the part of the Commission that the market is fully capable of ensuring that CMRS spectrum is put to the best, most efficient use, free from unnecessary government oversight. Flexible use will lead to advances in efficiency, increases in competition, and improvements in consumer welfare.

To this end, the Commission amended Sections 22.901 (cellular services), Section 24.3 (PCS), and Section 90.419 (SMR) of its Rules, and made modifications to rules governing narrowband CMRS (including paging, narrowband PCS, 220 MHz

mobile services such as PCS is limited and that alternative spectrum is available for fixed services." Id. at ¶ 7.

¹¹ Id. at ¶ 2.

¹² Id. (emphasis added). The Commission realized that allowing CMRS providers to provide fixed services without restriction would not result in limiting capacity for mobile services. Id. at ¶ 21.

service, and for-profit interconnected Business Radio Services) to permit the use of alternative cellular technologies or the provision of fixed services by CMRS providers on a co-primary basis with their mobile offerings.¹³ The Commission, however, failed to amend or eliminate the conflicting Section 22.323 of its Rules which provides that fixed services may be provided by cellular licensees on an incidental basis.¹⁴

The continued presence of this Rule is inconsistent with the decision reached in the Report and Order and the Commission's goals as set forth therein. The Commission clearly intended that all CMRS providers benefit from its new flexible use policies.¹⁵ Section 22.323 is inconsistent with the modified Section 22.901(d). As BellSouth notes, the error "may have an effect on the provision of fixed services by Part 22 licensees." Thus, the continued enforcement of § 22.323 would impose additional regulatory burdens solely on cellular carriers and in contravention of the goals set forth in the Report and Order. Principles of regulatory parity require that this section be

13 Id. at ¶ 24.

14 47 C.F.R. § 22.323 states that licensees of Public Mobile Services may provide services other than the primary services for which they are licensed, provided that the other services are offered on an incidental basis and subject to four conditions.

15 The Commission had originally proposed to increase the flexibility to provide fixed wireless services to broadband CMRS providers only. However, in its Report and Order, it agreed with commenters that it should extend this flexibility to narrowband services as well. Report and Order at ¶ 23.

deleted or modified¹⁶ to be consistent with Section 22.901(d) and all other like sections¹⁷ that apply to CMRS providers.¹⁸

The Commission's policy goals regarding flexible use of CMRS spectrum cannot be realized fully until the conflict between the Commission's Report and Order and its Rules is reconciled. CTIA believes that the continued existence of Section 22.323 (or the lack of an amendment to this section) is merely an oversight. If so, it should be eliminated or modified to be made consistent with Sections 22.901(d) and all other like sections that apply to CMRS providers.¹⁹ If, however, maintenance of Section 22.323 was purposeful, CTIA requests that the Commission reconsider its

¹⁶ If the Commission chooses to modify rather than delete Section 22.323, it must remove the conditions that are imposed on licensees as a pre-condition to providing fixed services. As stated above, regulatory parity requires that the rules governing the provision of flexible services be the same for all CMRS providers.

¹⁷ See e.g., 47 C.F.R. § 24.3 (PCS); 47 C.F.R. § 90.419 (SMR).

¹⁸ The notion of regulatory parity also requires that all CMRS providers utilizing CMRS spectrum continue to be regulated under Section 332 of the Communications Act (47 U.S.C. § 332) regardless of the combination of services (mobile or fixed) that they provide. As stated in CTIA's comments in this docket, the Communications Act's definition of "mobile services" grants the Commission great flexibility to adjust the set of CMRS service offerings, including certain fixed services, encompassed by the definition. This inclusive definition places CMRS fixed services within the state rate and entry preemption provisions of Section 332 of the Act and bars intrusive state regulation. See Comments of CTIA and Reply Comments of CTIA in this docket (filed March 1, 1996, March 25, 1996, November 25, 1996 and December 24, 1996, respectively).

¹⁹ Alternatively, as BellSouth suggests, the Commission should clarify that Section 22.323 does not apply to any services offered pursuant to Section 22.901 or the Report and Order.

decision, as this Section is clearly inconsistent with the decision reached in the Report and Order.

III. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission grant BellSouth's Petition.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
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CERTIFICATE OF SERVICE

I, Dennette Manson, hereby certify that on this 12th day of November, 1997, a copy of the foregoing Comments of The Cellular Telecommunications Industry Association was served by hand delivery unless otherwise indicated, upon the following:

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